

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

AT&T's Petition for Forbearance from Certain
Tariffing Rules

WC Docket No. 16-363

**PEERLESS NETWORK, INC.'S REPLY COMMENTS
OPPOSING AT&T SERVICES, INC.'S PETITION FOR
FORBEARANCE UNDER 47 U.S.C. § 160(c)**

Submitted: December 19, 2016

Henry T. Kelly
Michael R. Dover
KELLEY DRYE & WARREN LLP
333 W. Wacker Drive, 26th Floor
Chicago, Illinois 60606
Telephone: (312) 857-2350

Counsel for Peerless Network, Inc.

TABLE OF CONTENTS

	<u>PAGE</u>
I. AT&T's Petition Has Not Met The Evidentiary Standard For Forbearance Relief.	2
II. AT&T's Tandem Services Detariffing Proposal Is Overly Broad And Unduly Switches The Burden To Determine Access Stimulation On Tandem Providers.	5
III. AT&T's Concerns About Toll-free Database Query Dip Charges Not Appropriate For Forbearance.....	8
CONCLUSION	9

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

AT&T's Petition for Forbearance from Certain
Tariffing Rules

WC Docket No. 16-363

**PEERLESS NETWORK, INC.'S REPLY COMMENTS
OPPOSING TO AT&T SERVICES' PETITION FOR
FORBEARANCE UNDER 47 U.S.C. § 160(c)**

Peerless Network, Inc. ("Peerless"), through counsel and pursuant to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") on November 2, 2016,¹ hereby provides their reply comments opposing the Petition filed by AT&T Services, Inc. ("AT&T") on September 30, 2016² seeking forbearance from certain of the Commission's tariffing rules.³ As discussed herein, the Commission should deny AT&T's Petition because it fails to provide sufficiently persuasive support to meet the required procedural standard and on a

¹ *Pleading Cycle Established for Comments on AT&T's Petition for Forbearance from Certain Tariffing Rules*, WC Docket No. 16-363, Public Notice, DA 16-1239 (rel. Nov. 2, 2016) (the "Public Notice").

² *In the Matter of Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain Rules For Switched Access Services and Toll Free Database Dip Charges*, WC Docket No. 16-363 (AT&T's "Petition").

³ The AT&T Petition requests that the Commission forbear from enforcing "all of its rules that allow [Local Exchange Carriers (LECs)] to tariff a charge billed to [interexchange carriers (IXCs)] for toll-free database queries," and the following rules as they apply to certain LEC tandem switched access and transport charges: "47 U.S.C. § 203, 47 C.F.R. §§ 51.901 *et seq.*, 51.913, 61.1, 61.26, 61.47, 69.1 *et seq.*, 69.108, 69.111, 69.118 *et seq.*, and requirements from related Commission Orders 'including but not limited to *in re Provision of Access for 800 Service*, 8 FCC Rcd 907 (1993)." *Public Notice* at 1.

substantive basis it is not necessary nor in the public interest. The Commission should therefore deny AT&T's Petition.

I. AT&T'S PETITION HAS NOT MET THE EVIDENTIARY STANDARD FOR FORBEARANCE RELIEF.

Nearly all commenters agree with Peerless's view that AT&T's petition lacks sufficient facts to support the evidentiary basis for a grant of forbearance. 47 U.S.C. §160(a) outlines three factors that must each be supported by evidence in a petition for the Commission to employ its discretion to forbear from applying a regulation. The burden is on AT&T to provide adequate details and facts to meet the statutory criteria and persuade the Commission of the validity of its claims. Here, as noted by the entities identified collectively as the Carrier Coalition, "the [p]etition lacks the required evidentiary and analytical support for a forbearance request, and thus should be summarily denied."⁴

As Omnitel points out in its opposition, "[a]part from providing a laundry list of the provisions from which it seeks forbearance, the *Petition* makes no mention of the statutory provisions and rule sections again when attempting to apply the statutory criteria."⁵ The Carrier Coalition similarly highlights that the Petition is "devoid of any granular evidence or market analysis, does not contain any affidavits or other evidence to support its factual assertions, and

⁴ Carrier Coalition Motion for Summary Denial and Opposition of AT&T's Petition, WC Docket No. 16-363, 2 (filed Dec. 2, 2016) ("Carrier Coalition Opposition"). The Carrier Coalition consists of Birch Communications, Inc., BTC, Inc., Cbeyond Communications, LLC, Goldfield Access Network, LC, Kansas Fiber Network, LLC, Louisa Communications, Nex-Tech, Inc., and Peninsula Fiber Network, LLC. *See also* Opposition of Omnitel Communications, Inc., WC Docket No. 16-363, 4 (filed Dec. 2, 2016).

⁵ *See* Omnitel Opposition at 7-8.

seeks to rely on several factual assertions made without any citation or support whatsoever.”⁶ Peerless agrees.

In essence, AT&T’s Petition fails to show that the rules it seeks forbearance from are not necessary for just and reasonable charges or would be in the public interest. In fact, there is persuasive evidence to show just the opposite for both the tandem services and database dip charges portions of the Petition, as discussed in more detail below. For example, O1 Communications explains that the Petition “will destroy competition for intermediary transit and tandem services since reducing compensation for these services to bill and keep will leave these service providers without revenue to cover the costs of services they provide to third party carriers.”⁷ Peerless agrees with these comments for the reasons detailed in its initial comments.⁸

From the initial comments, the record before the Commission indicates overwhelming concern and opposition to AT&T’s forbearance request for both procedural and substantive reasons. Verizon was the only entity to support the Petition in full and its response provides no real assistance in the form of detailed evidentiary support to counter the wealth of information justifying denial of AT&T’s request. The foundational basis for AT&T’s forbearance request regarding tandem services is that there are some carriers that have tried to recover lost revenue due to access stimulation reform by colluding to charge higher tandem transport fees. Yet, as the Carrier Coalition correctly notes, that aspect of AT&T’s petition “is made up entirely of anecdotal

⁶ See Carrier Coalition Opposition at 3.

⁷ Opposition of O1 Communications, Inc., WC Docket No. 16-363, 17 (filed Dec. 2, 2016).

⁸ See Opposition of Peerless Network, Inc., WC Docket No. 16-363 (filed Dec. 2, 2016).

claims and hyperbole” as opposed to references to market analysis or data that would bolster the claims.⁹

As Consolidated and West explained, the Petition is lacking in details about which LECs have increased the amount of transport traffic and specific numbers showing the differing traffic volume numbers.¹⁰ Instead of substantive support, AT&T often “relies on conclusions from the *USF/ICC Transformation Order*, adopted more than five years ago” while maintaining that those reforms were insufficient but not providing any current data or factual evidence to back up its claims.¹¹ Further, the Petition would not be consistent with the public interest because it would eliminate tariffing which could ultimately help ensure that charges and practices are just and reasonable, and not unjustly or unreasonably discriminatory. HD Tandem emphasizes that “[s]ince detariffing -- in the absence of new rules -- would have little to no impact on the pricing practices of which AT&T complains (absent unlawful self-help), and yet more rigorous enforcement of the rules that apply to tariffs could protect consumers even if no new rules are adopted, AT&T has failed to meet its burden with respect to forbearance.”¹²

The Commission should deny AT&T’s forbearance request as it has failed to provide sufficient detailed evidence to support its claims and the filings on the record reflect near universal disagreement with AT&T’s proposed resolution to the issues from a variety of stakeholders.

⁹ See Carrier Coalition Opposition at 15. Carrier further notes that “AT&T merely provides a small number of unsupported, vague anecdotes, from which it attempts to extrapolate a need for across-the-board forbearance.”

¹⁰ See Consolidated Communications Companies and West Telecom Services, LLC’s Motion for Summary Denial and Opposition of AT&T’s Petition, WC Docket No. 16-363, 17 (filed Dec. 2, 2016); see also Carrier Coalition Opposition at 15-16.

¹¹ See Omnitel Opposition at 8.

¹² See Opposition of HD Tandem, WC Docket No. 16-363, 4-5 (filed Dec. 2, 2016).

II. AT&T’S TANDEM SERVICES DETARIFFING PROPOSAL IS OVERLY BROAD AND UNDULY SWITCHES THE BURDEN TO DETERMINE ACCESS STIMULATION ON TANDEM PROVIDERS.

Peerless reiterates its concern that AT&T’s proposal to detariff tandem transport and switching charges is problematic and should be denied as it seeks to apply the forbearance to an expansive scope of carriers, and that it would create an environment where tandem providers have no effective recourse to ensure compensation for services rendered and harm the competition in the current market for carrier services. This was highlighted by NTCA, which expressed cautioned that the Petition, if granted, “threatens to capture carriers that are not involved directly in alleged access stimulation.”¹³ A number of commenters stressed the fact that the expansive application intended by AT&T is only made clear in a footnote in the Petition. “Perhaps most egregiously, AT&T’s request that the Commission forbear from permissive detariffing rules for carriers *not even engaged in access stimulation*—which the Commission explicitly declined to do in the *USF/ICC Transformation Order*—is made in an unsupported footnote.”¹⁴

The Petition proposes a situation that is untenable and unfair for intermediate carriers like Peerless that provide tandem access services because it removes the mandatory tariff for the access charges on calls to and from LECs regardless of whether the intermediate carriers are engaged in access stimulation. O1 explains that “existence of intermediary service providers . . . is a sign of ongoing competition in the market to ILEC services which provide intermediate delivery of traffic between originating and terminating carriers.”¹⁵ Under AT&T’s proposal, tandem providers would

¹³ See Comments of NTCA-The Rural Broadband Association, WC Docket No. 16-363, 14 (filed Dec. 2, 2016) (“NTCA Comments”).

¹⁴ See Carrier Coalition Opposition at 3; *see also* NTCA Comments at 14; O1 Opposition at 2.

¹⁵ O1 Opposition at 14.

be required to negotiate rates even though they have no way of knowing if a LEC is engaged in access stimulation or if the LEC has a revenue sharing agreement associated with access stimulation. Therefore, tandem providers would be placed at a severe disadvantage whereby “[n]ot only would it be difficult to determine whether any call was “legitimate” or “stimulated,” but it would open the door for every sending carrier to refuse the charges, regardless of the actual cause of the traffic.”¹⁶ WTA correctly states “the detariffing of tandem switching and transport charges without a reasonable alternative recovery mechanism would wreak havoc.” Such an expansive regulatory change would ultimately result in many intermediate carriers being denied compensation for the services they provide due to actions beyond their control.

Contrary to the assertions made by Verizon, the only supporter of AT&T’s Petition, the proposal is not “discrete” in scope and the requested tariff forbearance would create an impractical process for tandem providers simply trying to secure payment. If AT&T has legitimate concerns about mileage pumping by specific LECs, there are alternative and more targeted avenues of remedy it can pursue through existing Commission procedures, such as through enforcement proceedings which Peerless highlighted in its initial comments. Indeed, even Verizon concedes this point stating “there are several ways the Commission could address this issue.” But Verizon ultimately promotes the forbearance request as being “a reasonable way to curb this form of traffic pumping.” The fact is that contention is wrong and the Commission should deny AT&T’s petition because it is not necessary and would likely result in increased disputes and unreasonable, discriminatory charges and practice.

¹⁶ NTCA Comments at 16.

Since tandem providers have no way of determining who is engaged in access stimulation, under AT&T's proposal there are likely to be disputes about what charges are legitimate and some interexchange carriers with significant bargaining power like AT&T could unilaterally decide not to pay for charges.¹⁷ As Carrier Coalition states if there was detariffing of tandem services "while the rest of the intercarrier compensation regime is left intact—which is exactly what the Petition proposes—IXCs would have no incentive to negotiate a reasonable rate."¹⁸ In addition, problems that already exist in this space surrounding interpretation and enforcement of the access stimulation rule could be exacerbated.¹⁹ "Even under the permissive tariffing regime, IXCs have sought to avoid payment altogether where the enforceability of a specific tariff is under dispute."²⁰ All of these factors would negatively impact the competitive environment in the tandem services market as tandem service providers would experience reduced revenues from unpaid access charges as well as increased costs to try to manage determinations of whether their network was used to engage access stimulation and arbitrate disputes.

Thus, AT&T's petition would ultimately only serve to worsen the current issues involving disputing charges, would potentially result in entities like AT&T receiving a windfall by receiving services for free²¹, and would definitely not result in the set rates that are the purported objective of the Petition. AT&T's petition would not be in the public interest and should be properly denied.

¹⁷ See O1 Communications Comments at 8.

¹⁸ See Carrier Coalition Opposition at 21.

¹⁹ See *id.*; see also O1 Comments at 9.

²⁰ Carrier Coalition Opposition at 21.

²¹ See O1 Comments at 12-13 ("[G]ranting the request will harm the public interest and consumer good by damaging the competitive marketplace by creating fodder for additional billing disputes and unilateral determinations by IXCs as to when and to whom forbearance applies.").

III. AT&T’S CONCERNS ABOUT TOLL-FREE DATABASE QUERY DIP CHARGES ARE NOT APPROPRIATE FOR FORBEARANCE.

Commenters that addressed the portion of AT&T’s Petition related to toll-free database query charges generally agreed that this is was not appropriate for forbearance and there was no justification in the Petition to support the request. The chief issue with AT&T’s detariffing proposal is it proposes no mechanism for those who provide database query services to have guaranteed cost recovery. Toll-free database dips are a necessary service that involves numerous functions, which should be compensated.

Yet, “AT&T contemplates that the originating LEC either should charge its own customer—turning the concept of toll-free calling on its head—or should eat the cost of the database query.”²² Such a scheme is infeasible given the purpose of toll-free calling is to allow the called party to engage their customers by offering to accept the charge for traffic from the calling party. As a result, the LEC originating the call has no way to charge the toll-free subscriber, or called party, for the database query because their relationship is with the calling party. AT&T provides no factual support for its claims that the forbearance would benefit the public and improve competition. Indeed, Teliix’s comments provide persuasive evidence that AT&T’s own rates for these services would seem to contradict its allegations against other carriers.²³

²² Comments of Windstream Services, LLC, WC Docket No. 16-363, 3 (filed Dec. 2, 2016).

²³ See Opposition of Teliix, Inc., WC Docket No. 16-363, 6 (filed Dec. 2, 2016) (“Unless AT&T is purposely charging excessive database query rates that are unjust and unreasonable, it must believe its rates as high as more than a penny per query are cost-related, reasonable rates. Yet it attacks the same level of rates as being unreasonable when another LEC charges them.”).

Peerless maintains that AT&T's Petition should be dismissed. If, however, the Commission believes it should address the issue of excessive toll-free database dip charges, it should establish a competitive LEC benchmark at the rate of the competing incumbent LEC.²⁴

CONCLUSION

For the reasons stated herein and in its initial comments, the Commission should deny AT&T's request for a forbearance from the Commission's tariffing rules described in the *Public Notice*.

Submitted: December 19, 2016

Respectfully submitted,

PEERLESS NETWORK, INC.

/s/Henry T. Kelly
Henry T. Kelly
Michael R. Dover
KELLEY DRYE & WARREN LLP
333 W. Wacker Drive, 26th Floor
Chicago, Illinois 60606
Telephone: (312) 857-2350

Counsel for Peerless Network, Inc.

²⁴ See generally Opposition/Comments of CenturyLink, Inc., WC Docket No. 16-363, 5 (filed Dec. 2, 2016) (explaining that the Commission should clarify that database query charges are subject to the CLEC benchmark rule).